Supreme Court, U.S.
FILED

94 808 NOV 1 1994

No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CLIFFORD E. SMITH, JR. - PETITIONER

VS.

"TOM KELLY"
(alias RICHARD SIRBELLO), ET AL-RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CLIFFORD E. SMITH, JR.
361 LINDEN WALK #3
LEXINGTON KY 40508-3019
AC 606 253-0802

PETITIONER, PRO SE

92pp

QUESTIONS PRESENTED

1. Did the District Court and Court of Appeals err in holding as a matter of law that Plaintiff's civil action for damages against the named diverse defendants is essentially a collateral attack on a decision of the Kentucky Supreme Court that temporarily suspended Plaintiff without an evidentiary hearing on a charge of mental disability?

2. Where a preliminary showing can be made that a prior State Supreme Court Order was initiated by what has subsequently become apparent was perjured testimony, should Plaintiff be precluded from federal diversity suit against the perjurer on ground it would constitute a collateral attack on the prior state court order?

3. If a preliminary showing can be made that a quasi-judicial and/or judicial body was misled in seeking and/or rendering a prior judicial order that temporarily suspended Plaintiff from the practice of law without an evidentiary hearing on a charge of mental disability, should Plaintiff be barred from federal suit against those who collaborated in misleading the quasi-judicial bar association and state supreme court on ground such suit would constitute an impermissible

collateral attack on the prior court order?

4. Does Plaintiff have a constitutional right under the Constitution of the Commonwealth of Kentucky, Bill of Rights, Section 14, to pursue his civil action against the named defendants herein?

5. Does the action of the lower courts violate Plaintiff's right to due process of law in violation of the 5th, 7th, 9th and 10th Amendments, Bill of Rights Provisions, of the Constitution of the United States?

6. Does the action of the lower courts violate Plaintiff's right to due process of law under the Constitution of the Commonwealth of Kentucky, Sections 1, 2, 7, 14, and 26 of the Bill of Rights Provisions thereof?

7. Did the lower courts err in denying Plaintiff the right to pursue discovery herein?

   A. Did the Magistrate Judge err in delaying for nearly three (3) months a ruling on Plaintiff's motion of May 27, 1993, for an order compelling discovery?

LIST OF PARTIES TO PROCEEDINGS

Clifford E. Smith, Jr. -
Plaintiff/Appellant/Petitioner

Tom Kelly (alias Richard J. Sirbello) - Defendant
(personally served with process but did not enter an appearance in person or by counsel)

Jemklan & Associates, Inc. - Defendant
(Could not be found when service of process was attempted.)

Mitchell A. Leutenberg - Defendant
(Reported deceased and thus service of process was returned unserved)

Jay Leutenberg - Defendant
(personally served with process; moved to dismiss in District Court and did not enter an appearance in person or by counsel in appellate proceedings)

Estelle Leutenberg - Defendant
(personally served with process; moved to dismiss in District Court and did not enter an appearance in person or by counsel in appellate proceedings)

Frank E. Wrenick - Defendant/Appellee
(personally served with process; appeared by counsel in both District Court and Court of Appeals proceedings)

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CLIFFORD E. SMITH, JR. -
PETITIONER

vs.

TOM KELLY (alias RICHARD J> SIRBELLO)
INDIVIDUALLY AND D/B/A JEMKLAN
ASSOCIATES, INC., ET AL RESPONDENTS

PETITION

Clifford E. Smith, Jr. petitions for a writ of certiorari to refview the final judgment and opinion of the U. S. Court of Appeals for the Sixth Circuit which was entered on August 3, 1994.

OPINIONS BELOW

The report of findings and recommendation of the Magistrate Judge (92-382, App. A-1) is not reported. The Order and Opinion of the U. S. District Court for the Eastern District of Kentucky (92-382, App. A-18) is not published. The Order and Opinion of the U. S. Court of Appeals for the Sixth Circuit (93-6476, App. A-20)is not published.

JURISDICTION

Order and Opinion of the U. S. Court of Appeals for the Sixth Circuit was entered on August 3, 1994. Petition for rehearing was received by the court after the time for it had expired and it was ordered not to be filed, an order petitioner herein does not attack and which is not at issue herein. This court's jurisdiction is invoked pursuant to 28 U. S. C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Federal Constitutional Provisions

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of his life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation. (pertinent part underlined)

AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

AMENDMENT IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

KENTUCKY CONSTITUTIONAL PROVISIONS

SECTION 1, BILL OF RIGHTS. INHERENT AND INALIENABLE RIGHTS

All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

First: The right of enjoying and defending their lives and liberties.

Second: The right of worshipping Almighty God according to the dictates of their consciences.

Third: The right of seeking and pursuing their safety and happiness.

Fourth: The right of freely communicating their thoughts and opinions.

Fifth: The right of acquiring and protecting property.

Sixth: The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance.

Seventh: The right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons.

Commission. Petitioner also operated a 523 acre farm which was the principal asset of a testamentary family trust.

In 1970, when six years out of law school and 34 years of age, Petitioner undertook legal representation of the Kentucky Association of Highway Contractors and its Executive Director in a suit brought against them and others styled **J. D. Barter Company and Mattingly Bridge Co. v. Eugene Goss, Commissioner of Highways, et al**. The suit alleged tortious interference with the creation of a legitimate business expectancy arising from the submission by Barter of low bids on three (3) partially federally funded highway construction projects and consequent damages.

Although it became evident early in the history of the case that plaintiffs could never recover because they contradicted each other as to the nature of their own legal relationship and because it also became evident that they had themselves submitted illegal bids, the Franklin Circuit Court and the Kentucky Supreme Court (then the Kentucky Court of Appeals) let the case go on for a total of <u>eleven years!</u>

The plaintiffs were permitted <u>six years</u> of discovery over repeated objections all of which were to no avail. When the case was six years old, Petitioner as defense counsel in the civil suit sought a writ of prohibition which the Kentucky

Court of Appeals ,which became the Kentucky Supreme Court in 1978, denied on stated ground defendants had an adequate remedy at law by way of appeal in event of an adverse verdict.

Three years later, the case came on for trial and after presentation of plaintiffs' evidence was dismissed for failure to make out a **prima facie** case.

It then went back up the appellate ladder, this time via an intermediate state appellate court established in 1978, and to the Kentucky Supreme Court which affirmed its dismissal in June 1981.

Sixty days prior to the ultimate mandate dismissing this civil suit, the U. S. Department of Justice, Division of Anti-Trust, operating out of offices in Cleveland, Ohio, convened a special federal grand jury in Louisville, Kentucky to investigate alleged highway bid rigging in the state of Kentucky as part of a multi-state anti-trust investigation it publicly announced at the time was the biggest anti-trust case ever undertaken up to that time by the U. S. Department of Justice. The Kentucky Association of Highway Contractors was named a "target" as was one or more of the corporations of one of the other defendants in the civil suit who was represented therein by other counsel.

During the pendency of the civil suit in which Petitioner was a defense counsel, his law offices were burglarized and although safes, files

discharge, Petitioner has neither taken nor had to take any medication for mental or emotional difficulty except rarely, very rarely, aspirin for a headache.

The only medical treatment Petitioner has received since January 1974 has been 1)for a poison ivy infection in 1986 or 1987 and 2)a penicilin shot one year for the flu and 3)flu shot and tetanus booster in 1993.

When Petitioner in 1979 challenged the accuracy and completeness of the transcript of the trial proceedings which had been prepared for appellate purposes after plaintiffs in the case had initiated appeal, Petitioner was informed that such could not be checked because the tapes of the proceedings had been "accidentally erased" --not one segment, mind you, but those of the entire proceedings of trial which had lasted nearly two weeks!

In June or early July 1982, as the federal grand jury in Louisville was nearing the end of its term scheduled to expire in mid-Oc tober 1982, Petitioner herein, on his own initiative, went to Louisville, contacted one of the attorneys in the office of the U. S. attorney, and with him and with counsel of some defendants unrelated to my civil suit went before a federal judge, first in chambers, then in open court, to say that I had reason to believe there had been investigative or prosecutorial misconduct and to suggest that he direct the U. S. attorney to go back to his evidence and to the sources of that evidence to ascertain whether this was in fact correct and to

report his findings to the Court before it accepted any negotiated pleas arising from indictments from that grand jury. I was politely heard, but my suggestion was not accepted.

In September 1982, when the grand jury in Louisville had less than a month to go, I received a call from a person who said his name was "Tom Kelly", which is the name of a Louisville archbishop who was formerly Executive Secretary to the National Council of Catholic Bishops, and who was calling from Cleveland, Ohio, and who said that he had a subrogation claim of the Motorist Mutual Insurance Company that he would like for me to handle on the "usual contingent fee basis". I had never heard of him or of his adjusting firm but told him that if he would like to forward the claim file for my inspection I would review it and get back to him.

This individual would later claim that I had agreed to undertake representation, file sight unseen, in the initial telephone conversation, which he later testified under oath entailed only the "briefest of descriptions". This is the only point on which his testimony before a trial commissioner of the bar association differs from my version and position. However, he would later contradict his own testimony, though that is to get ahead of the story.

The federal grand jury in Louisville expired in October 1982 without indicting anyone connected to my 1970-1981 civil suit but referred its "uncompleted work" to another federal grand jury in Lexington, Kentucky that had been convened to investigate alleged corruption in the Julian Carroll state administration and which would not expire until July 1983.

When I received the subrogation claim file, it was not as described to me even in that "briefest of descriptions". The claim was two years old (5 yr. SOL); if the investigating officer's report was correct (and there was nothing in the file to indicate it wasn't) the intended defendant had a complete defense; and it directed me to promptly file suit and take a whole list of other actions, including foreclosure, garnishment of wages, and more, to recite but just part.

"Mr. Kelly" called me long distance on that $1100 subrogation claim often and repeatedly, and I have acknowledged that I did not return those calls. His last call to me, in late December 1982, threatened me with complaint to the bar association if I didn't promptly file suit. I told him that I was in the process of moving my law offices from where they had been for almost 50 years to a new location, files were bundled for moving, and that as soon as I could I would check the matter and get back to him.

"Tom Kelly" thereafter filed a complaint

against me with the Kentucky Bar Association. It was signed "Tom Kelly" and his signature was notarized by a Frank E. Wrenick.

There was a young, inexperienced Deputy Director for Discipline at the KBA at the time, who was unacquainted with my earlier service to the KBA. Michael Hooper had never before handled a subrogation complaint in his life, but he took it the complaint to a tribunal, who, as he later acknowledged in testimony at a hearing, asked no questions, instead simply accepted his recommendation that a formal charge issue, and it did, alleging failure to communicate with a client.

I had earlier, in February 1983, after complaint but before formal charge, returned the file to "Mr. Kelly". It still had almost 3 years left in regard to its applicable statute of limitations.

At the hearing, I tried to produce evidence of the circumstances surrounding my receipt of the telephone call from "Tom Kelly", contending that, regardless of whether there was a connection between it and the grand jury proceedings involving the civil suit defendant of mine, a connection I declined to assert but left an open question, I was nevertheless entitled to show the circumstances, the context if you please, existing when I received and reacted as I did to the call and the actual file I received. I was ruled out of order and was not permitted to do so. However, when the hearing was over, Mr.

Hooper was plainly embarassed. "Mr. Kelly" had acknowledged that the subrogation department of Motorist Mutual had declined to pursue the claim as not worthwhile; had acknowledged that if the investigating police officer's report was correct, the intended defendant had a complete defense; that he had pursued it for two years without success before referring it to me; that he had subsequently referred it to another firm, which had sat on it far longer than I had; that as of the date of the hearing in 1984 it still had not been collected, and so on. (It would later be collected by default judgment and garnishment.)

Michael Hooper could not understand why I seemed so insistent on bringing in evidence as to the circumstances in which I received the call and reacted to it. Such evidence was ruled irrelevant and immaterial. However, at the conclusion of the hearing, I also requested that the bar association staff undertake an inquiry as to why my civil suit had been so prolonged--its staff never did so.

After the hearing, I was asked if I would voluntarily undergo a psychiatric evaluation. I said that I would consider that an indignity. It does illustrate the vulnerability of someone who has at any time in his or her history experienced that sort of difficulty, and what subsequently occurred underscores this statement.

I was next served with a Petition to the Kentucky Supreme Court that Michael Hooper

Hooper had drawn seeking my temporary suspension on grounds of mental disability! No one can honestly dispute the following undeniable facts: 1)until receipt of the petition to the Kentucky Supreme Court, I had not been charged with mental disability, a separate charge from that of failure to communicate with a client; 2)no medical or psychiatric testimony had been taken; 3)no then existing client of mine had testified to such effect; 3)no person with whom I was in daily or even weekly contact had so testified; 4)the facts embarassing to Mr. Hooper at the hearing had been brought out by me on cross-examination of "Mr. Kelly".

Although it is to be taken up in a separate proceeding from this, the Kentucky Rules of Practice have a provision that I am quite satisfied can't pass constitutional muster that allows the bar association on affidavit to petition the Kentucky Supreme Court for suspension of an attorney on grounds of mental disability without an evidentiary hearing. It was intended for cases in which there is a problem of senililty, drug or alcohol abuse, none of which are applicable to me or have been alleged to be applicable to me. Yet it was that provision that was utilized on affidavit of Michael Hooper; he had decided to force me to undergo a psychiatric evaluation.

The Kentucky Supreme Court first divided 5-2 to order me to undergo a psychiatric evaluation, two justices dissenting. I declined.

The Kentucky Supreme Court then entered the Order temporarily suspending me from the practice of law on stated ground of mental disability. Still, there had been no evidentiary hearing on such a charge, and still no medical doctor or psychiatrist or existing client or person with whom I was in daily or even weekly contact had so testified!

I asked the Kentucky Supreme Court justices for specific findings of fact to support its conclusion of law. This was denied, two justices dissenting, saying they would vote to grant the motion.

What then followed was a series of plaintly unlawful events by which I was deprived of nearly everything I owned.

What set all of this in motion? The complaint of "Tom Kelly" to the Kentucky Bar Association.

In 1987, I brought suit against Tom Kelly and Jemklan & Associates, Inc. in U. S. District Court for the Eastern District of Kentucky. The jurisdictional basis of the suit was diversity, and the complaint alleged fraud and misrepresentation in the referral of the claim to me, not his testimony to the KBA for which I at the time thought he would have witness immunity.

"Tom Kelly" alone responded by a handwritten answer in which he 1)said for the first time that his name wasn't really "Tom Kelly" but instead Richard J. Sirbello; 2)that he had described the claim to me in great detail in that initial telephone call; 3)that he was a former vice-president of Jemklan & Associates, Inc.; 4) that the claim had been eventually collected thus allegedly proving that it was a "valid" claim.

Pursuant to investigation, I learned that contrary to "Tom Kelly's" testimony to the Kentucky Bar Association that he had left other advantageous employment to found Jemklan & Associates as his own company, it was actually owned by others. I also learned by such investigation that the person who notarized the signature of "Tom Kelly" on the complaint to the bar association, Frank E. Wrenick, was not just a clerical notary someplace but an attorney who was licensed to practice in Indiana, resided in Cleveland, Ohio, and was registered with the Supreme Court of the State of Ohio as is the practice in that state. And, without going further, that is not all that I learned.

The 1987 suit had been dismissed without prejudice, the Court saying it constituted an impermissible collateral attack on the Order of the Kentucky Supreme Court entered in 1984. While I disagree with the ground stated, I do not challenge the Order itself, as I was at the time struggling to survive.

In 1982, I again filed suit in the U. S. District Court for the Eastern District of Kentucky. This time I named not only "Tom Kelly" (now alias Richard J. Sirbello) and Jemklan & Associates, Inc. but also the owners of Jemklan & Associates, Inc. and Frank E. Wrenick.

Service of process upon some of defendants, including those who had owned Jemklan and Frank E. Wrenick was delayed by several weeks and as to one of them by about a month. The delay by the U. S. Postal Service is a matter of record in this proceeding; the reason(s) for that delay is not. However, the delay of the service rendered the proceeding, CA 92-382 subject to motion to dismiss on ground of a rule requiring service within 90 days of date of filing. I thus had to file the suit again, CA 93-34, in which I spent the funds necessary to effectuate personal service of process, and moved that the two cases be consolidated, which they were.

I do not in this proceeding, which had to be brought as it has been to preclude statutes of limitation defenses, seek to set aside, overturn, or invalidate the Kentucky Supreme Court Order of November 1984 temporarily suspending me from practice. That is something that will likely be coming to this Court in the near future. You can, if you choose, let this pend until that has been set aside or is before this Court

I shall state, as I have herinbelow, that I obtained other employment and have lived independently since 1984, notwithstanding

an Order of the Kentucky Supreme Court saying I was mentally disabled and subsequent events predicated upon that by which I have been deprived of nearly everything I once owned. I am now almost 58 years of age, and since January 1974 have been in excellent health, physically, mentally, and emotionally.

It was my contention, and it remains my contention, that what the KBA did was wrong,; what the Kentucky Supreme Court did was wrong; what a Circuit Judge did based on the Kentucky Supreme Court Order was wrong; and what a District Judge did in an effort to bail out the Circuit Judge was wrong. This is set forth in more detail in a related case also now before this Court on petition, Clifford E. Smith, Jr. v. William Barrett et al.

The Magistrate Judge hereinbelow filed Proposed Findings of Fact and Recommendation. It should be noted that he did so upon Motions to Dismiss, for which purpose the allegations of the Complaint are taken as true. I was not allowed to pursue discovery, and the case has not reached discovery or eventiary stage. My objections and exceptions to his report can be found in Appendix A- .

I should like the reviewer here to also note that the Magistrate Judge refers to the Kentucky Supreme Court Order and its "underlying factual findings regarding the relationship which existed between the parties in 1982". No such

underlying factual findings exist! Let me reemphasize that: No such factual findings exist! First, the trial commissioner of the KBA did not make any, awaiting further developments. The matter never went to the Board of Governors, which probably would have reined in its staff if it had. And the Kentucky Supreme Court declined to make findings of fact , two justices dissenting from that decision.

Other proposed findings of the Magistrate Judge are equally misleading. See Objections and Exceptions, Appendix A-7.

And neither of the cases cited by the Magistrate Judge, and later accepted by both the District Court and U. S. Court of Appeals for the Sixth Circuit are analogous or applicable to this case.

Yet both the District Court and Court of Appeals, 6th Circuit, held hereinbelow that the Petitioner's Complaint, Appendix A-30, constitutes a collateral attack on the prior Order of the Kentucky Supreme Court and that accordingly the U. S. District Court lacks subject matter jurisdiction.

This case was thus dismissed hereinbelow and Petitioner's efforts to obtain specific, limited discovery was denied as moot.

REASONS FOR GRANTING THE WRIT

This case presents a straightforward issue of what rights an attorney suspended from practice has against persons it subsequently becomes apparent committed perjury, false swearing, and/or collaborated with the perjurer in the commission of same against the attorney.

ARGUMENT

1. The lower Courts erred in holding as a matter of law that Plaintiff/Petitioner's diversity action against defendants for damages for fraud and misrepresentation is essentiallyh a collateral attack on an earlier Order of the Kentucky Supreme Court temporarily suspending Plaintiff on ground of mental disability without an evidentiary hearing on a charge of mental disability.

No one can honestly dispute that when the Kentucky Supreme Court temporarily suspended Plaintiff from the practice of law in November 1984 on stated ground of mental disability, the only charge on which an evidentiary hearing had been conducted was the charge of failure to communicate with a client, which was based on the Complaint to the Kentucky Bar Association by "Tom Kelly". This is an indisputable **fact.**

But for the Complaint of "Tom Kelly", and the hearing at which Plaintiff, in addition to challenging "Tom Kelly" on cross-examination, tried to show the attendant circumstances and context in which he admittedly did fail to answer "Mr. Kelly's numerous and repeated telephone calls, but was ruled out of order in such effort.

The cases the lower courts have cited in support of their conclusion are neither analogous nor applicable to this case.

Ginger v. Wayne County Circuit Court, 372 F. 2d 621, 625 (6th Cir.), cert.denied, 387 U. S. 935 (1967) dealt with an action by an attorney directly against a Circuit Court, its judges and members of a grievance committee of a state bar for compensatory damages. Plainly, the case now before this Court is not such a case. Furthermore, if you read this case, you will see it is easily distinguisable on other grounds as well.

Fair v. Givan, 509 F. Supp. 1086 (N.D. Ind. 1981) doesn't even consider whether something is or is not a collateral attack. It was an action by a state prison inmate seeking injunctive and declaratory relief against the state attorney general and Chief Justice of the Indiana Supreme Court to prevent them from keeping another inmate from assisting him in various legal matters in state court. And again, if you read this case, you will see that it also is easily distinguishable on other grounds as well.

What is a collateral attack? It is an attack on a judgment or order to avoid its binding force in a proceeding not instituted for such purpose. See Ernell v. O'Fiel, Tex Div App, 441 S. W. 2d 653, 655; Words & Prases, Collateral Attack.

It most certainly is true that evidence in this case would be most embarassing to both the Kentucky Bar Association staff and the Kentucky Supreme Court, but that today is already a fact. And in this regard, I might point out to the Court that a study conducted of 32 state bar associations and that of the District of Columbia found the KBA, under its Director Bruce Davis and former Deputy Director Michael Hooper, the worst in the nation, flunking it in every respect examined. It was completed in 1987 by Halt, a nationwide organization interested in legal reform. Having dealt with the aforenamed individuals, I can readily understand why.

Nevertheless, a successful verdict in Petitioner's suit against the defendants herein would not of itself alter or affect or avoid the binding force of the Kentucky Supreme Court temporary suspension entered in 1984. And that is why this is not a collateral attack on that Order.

Ask yourself, until that temporary suspension is lifted or set aside, would success in this suit enable Petition to practice law? No.

This is not an attempt to avoid, defeat, or evade the Order of the Kentucky Supreme Court or to

deny its force and effect. Neither is it an action for the express purpose of obtaining relief from that Order. Petitioner had to file and pursue this action before it became subject to limitations.

Now, if it became apparent that you had been damaged by someone perjuring themselves and/or falsely swearing against you and by persons collaborating with the perjurer and the SOL was coming up, which would you on limited funds pursue first--suit for damages against the foregoing persons or set aside of the Kentucky Supreme Court Order which you have done allright without since 1984?

Bear in mind that it did not become apparent in a provable way that perjury had been committed until "Tom Kelly's" handwritten response to the Petitioner's initial suit against him in 1987. I knew he had, but it would have been his word against mine, and the incompetent Michael Hooper had accepted his over mine!

Why hasn't the bar association and Supreme Court acted on their own initiative to remedy what they did? The unfortunate answer is that they are afraid to because pursuant to what they earlier did Petitioner has by a series of chain events based thereon been deprived of nearly everything he once owned, which events took place before the perjury became apparent and undeniable in 1987.

No, this is not an impermissible collateral attack on the Kentucky Supreme Court's Order of November 1984; it is a suit for damages against the self-admitted perjurer and those who aided him, and any effort to confuse the two can only be an attempt at "judicial cover-up" that will ultimately be even more embarassing to the judiciary.

2. Where a preliminary showing can be made that a prior State Supreme Court Order was initiated by what has <u>subsequently become apparent</u> was perjured testimony, Plaintiff should not be precluded from federal diversity suit against the perjurer on ground it would constitute a collateral attack on the prior state court order.

Cite me a case to the contrary. I submit to you that this is what you should hold; that this is a rule of reason that protects the innocent but assures appropriate remedy against the wrongdoer(s). Is that brief enough?

3. A variation of this argument would permit opportunity for a preliminary showing that the quasi-judicial and/or judicial body was misled in taking the action which it took.

While this approach may also have merit, it would perhaps be subject to challenge on ground

that its net effect would amount to a collateral attack. Nevertheless, given the penchant today for some bureaus of government of all branches to decline to admit they were wrong, it is an approach that also may have merit notwithstanding its vulnerability to such challenge. In other words, if it should subsequently become evident and provable that the quasi-judicial or judicial body had acted upon false premises, but it was voluntarily recalcitrant in admitting that, then a preliminary hearing might nonetheless be appropriate.

4. Plaintiff has a constitutional right under the Constitution of the Commonwealth of Kentucky, Bill of Rights, Section 14, to pursue his civil action against the named defendants herein.

The Constitutional provision overrides the common law rule. Simple jurisprudence.

5. The action of the lower courts violate Plaintiff's right to due process of law in violation of the 5th, 7th, 9th, and 10th Amendments, Bill of Rights Provisions, of the Constitution of the United States.

To hold that I have no remedy against the perjurer and those who collaborated with him in the perpetration of the fraud and misrepresentation by which I have been directly deprived of personal property as well as indirectly deprived of real property and nearly

everything I once owned, both real and personal, violates some fundamental constitutional principles. Sometimes it is refreshing just to recite what they are.

6. The action of the lower courts violate Plaintiff's right to due process of law under the Constitution of the Commonwealth of Kentucky, Sections 1, 2, 7, 14, and 26 of the Bifll of Rights Provisions thereof?

If you accept the false notion that suit herein against the perjurer and the defendants who collaborated with him is a collateral attack on the November 1984 Order of the Kentucky Supreme Court, which I adamantly deny, which prevails--the common law doctrine of collateral attack or the just above cited provisions of the Bill of Rights section of the Constitution of the State of Kentucky?

In **Commonwealth of Kentucky v. Jones,** 73 KY. 725 (1874), the then constituted Kentucky Court of Appeals held that "there are no implied exceptions to the Bill of Rights."

7. Lastly, I maintain that the lower courts erred in denying me the right to pursue discovery herein.

A. And in this regard, I raise the question whether a delay of nearly three(3) months in ruling upon a simple

motion for an order compelling discovery, which itself requires virtually no research, satisfies the standards required or expected by the United States Supreme Court.

And for the reviewer, there are more than ten (10) inaccuracies in the Order/Opinion of the U. S. Court of Appeals, which I shall be glad to detail if this petition is granted. You will probably be able to discern several of them without prompting on my part.

CONCLUSION

What this Court should do is 1)grant the writ of certiorari to the United States Court of Appeals for the 6th Circuit, directing it to transmit to this Court the record in this case, including, of course, the Joint Appendix, 2)Order that there be transmitted to this Court for its review in conjunction with this case the transcript of the proceedings of the Kentucky Bar Association on complaint of "Tom Kelly" and proceedings pursuant thereto on Petition for temporary suspension of the Plaintiff, and then reverse and remand this case to the U. S. Court of Appeals for the Sixth Circuit with directions it send the same back to the U. S. District Court for the Eastern District of Kentucky for a preliminary hearing on whether there is reasonable evidence upon which to conclude that the allegations of the plaintiff's complaint are true and, if so, that he be permitted to pursue his diversity action against the defendants.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION
CIVIL ACTION NO. 92-382

CLIFFORD E. SMITH, JR.
PLAINTIFF

VS. PROPOSED FINDINGS OF FACT AND RECOMMENDATION

TOM KELLY, et al.,
DEFENDANTS

* * * * *

I. INTODUCTION:

This action is before the Court on the Defendants' motions to dismiss and for sanctions.[1] This action has been referred to the undersigned Magistrate Judge for consideration p28 U.S. C. Section 636 (b)(1). (DE #12).

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[1] This action was recently consolidated, and, therefore, for purposes of keeping the record clear, the Magistrate Judge notes that he is considering all of the Defendants' motions to

II. DISCUSSION:

A. Facts:

The facts underlying this controversy are essentially that in 1982 the Defendants, who are citizens of Ohio, contacted the Plaintiff, who at the time was an attorney licensed to practice law in the Commonwealth of Kentucky, regarding his accepting and handling a legal matter for them in Kentucky. The record reflects that there is a substantial dispute between the parties as to what actually happened, but the bottom line is that the Defendants subsequently caused a complaint to be filed against the Plaintiff with the Kentucky Bar Association, which in turn resulted in the Kentucky Supreme Court suspending the Plaintiff's license to practice law. The order of suspension entered on November 9, 1984, and although it is styled as a temporary suspension, said suspension has not to this date been lifted. [2]

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dismiss, regardless of whether they were, before the order of consolidation, filed in this action or in the consolidated action of Lexington Civil Action No. 93-34. In other words, the Magistrate Judge is considering in this recommendation the motions to dismiss filed by the Defendants in Lexington Civil Action No. 93-34 which was docket entries #10 and #15, and the motion to dismiss filed by the Defendants in Lexington Civil Action No. 92-382, which is docket entry #15.

[2] The order of the Kentucky Supreme Court, in

B. The Plaintiff's Claim:

The Plaintiff alleges that this federal court has subject matter jurisdiction based on diversity of citizenship pursuant to 289 U.S.C. Section 1332. The Plaintiff claims that the Defendants' statements and actions in retaining his services, or at the least attempting to retain his services, in 1982 were fraudulent, and that the Defendants' complaint to the Kentucky Bar Association was unfounded, and that the statements made in support thereof were false.

C. Law

The Defendants advance different arguments in support of their motions to have this action dismissed for failure to state a claim, including res judicata, laches and statute of limitations, and lack of subject matter jurisdiction. The Magistrate Judge finds no merit to the res judicata argument because this Court's prior

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relevant part, provides:

> The temporary suspension of respondent shall be effective with the entry of this order and shall continue in effect until such time as the merits of this disciplinary proceeding can be finally determined by this Court in accordance with SCR 3.370 or SCR 3.480 or until such time as respondent can show good cause why the order of temporary suspension should be amended or dissolved. . . .

See Lex. Civ. No. 93-34, DE #11 at Exhibit A).

dismissal of this same claim was without prejudice. (DE #16, attached, Lex. Civ. No. 87-489). While the Magistrate Judge believes that the laches and statute of limitations arguments may have merit, he does not result his recommendation on those arguments because the Defendants neither state what the applicable statute of limitations is, nor what juris-prudential interests would require application of the common-law doctrine of laches.

Notwithstanding the fact that the citizenship of the Plaintiff and the Defendants is diverse, the Magistrate Judge find(sic) that this federal district court lacks subject matter jurisdiction over the claims asserted in the Plaintiff's complaint. As this Court noted in Lexington Civil Action No. 87-489, the Plaihntiff's complaint consists of essentially a collateral attack on the decision of the Kentucky Supreme Court regarding its decision to suspend the Plaintiff's license, and its underlfying factual findings regarding the circumstances of the relationship between the Plaintiff and the Defendants in or around 1982. (DE #16, attached). The law appears to be clear that a federal district court does not have subject matter jurisdiction to engage in such a collateral attack, and that such a decision can only be reviewed byh the United States Supreme Court. See Ginger v. Wayne County Circuit Court, 372 F. 2d 621, 625 (6th Cir.), cert.denied, 387 U.S. 9155 (1967); Fair v.

Givan, 509 F. Supp 1086,1088-89 (N.D. Ind. 1981).[3]

III. CONCLUSION:

For the reasons previously stated,

IT IS RECOMMENDED that the Defendants' motions to dismiss this action be SUSTAINED, that the Defendants' motion for sanctions be OVERRULED, and that this action be DISMISSED WITH PREJUDICE and STRICKEN from the active docket of this Court.

The Clerk of the Court shall forward a copy of this Proposed Findings of Fact and Recommendation to the respective parties who shall, within ten (10) days of receipt thereof, serve and file timely written objections to the Magistrate Judge's Proposed Findings of Fact and Recommendation with the District Court or else waive the right to raise the objections in the

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[3] The Magistrate Judge believes that the law does not permit the Plaintiff to invoke the subject matter jurisdiction of this federal court merely by drafting his complaint as a diversity action based on a claim of fraud, rather than drafting it as what it truly is -- a collateral attack on the findings underlying the 1984 decision of the Kentucky Supreme Court to suspend his license.

Court of Appeals. 28 U.S.C. section 6366(b)(1)(B); Thomas v. Arn, 728 F. 2d 813 (6th Cir. 1984), affirmed, 474 U. S. 140 (1985); Wright v. Holbrook, 794 F. 2d 1152, 1154-55 (6th Cir. 1986). A party may file a response to another party's objections within ten (10) days after being served with a copy thereof. Fed. R. Civ. P. 72(b).

This the 16th day of August, 1993.

/s/ James F. Cook
James F. Cook, U.S. Magistrate Judge

DATE OF ENTRY AND DISTRIBUTION:

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CAs 92-382 & 93-34 consolidated
By Order dtd 8/16/93 as CA 92-382

CLIFFORD E. SMITH, JR.
PLAINTIFF

VS. PLAINTIFF'S EXCEPTIONS TO MAGISTRATE JUDGE COOK'S PROPOSED FINDINGS OF FACT AND RECOMMENDATION

TOM KELLY, ET AL
DEFENDANTS

* * * * * * * * * * * *

I. INTRODUCTION:

The Magistrate Judge inaccurately states that this action is before the Court on the Defendants' motions to dismiss and for sanctions. That is a partial truth at best because 1)defendant "Tom Kelly" has not responded to the summons, Complaint, and Amend-ments to the Complaint served upon him herein and thus has made no Motion to Dismiss; 2)defendant Jemklan & Associates, Inc. has not made an appearance

herein and according to the U. S. Postal Service could not be found; 3)defendant Michael A. Leutenberg, whom the Ohio Secretary of State's opffice says was the listed President of Jemklan & Associates, reportedly committed suicide in 1987; and because 4)the action is also before the Court on Plaintiff's Motion to Compel Discovery. The latter was filed in late May, asking for an Order by June 8, 1993, following Defendant Frank Wrenick's failure to respond to a Request for Production of Photographs.

II. DISCUSSION:

A. Facts: The Magistrate Judge's recitation misstates the "facts" he recites and omits facts essential to an understanding of this case. First, he misstates that "the Defendants" contacted Plaintiff. Insofar as the plaintiff knows and the record shows, only defendant "Tom Kelly", the non-responding defendant, spoke with Plaintiff, though he worked for a corporation in which defendants Leutenberg had interests.

The Magistrate Judge misstates that "The record reflects that there is a substantial dispute between the parties as to what actually happened..... Actually, the only aspect or fact in dispute between Plaintiff and witness "Tom Kelly" in the filings with the Kentucky Bar Association and at its hearing was "Tom Kelly's" claim that the Plaintiff herein had agreed to represent Jemklan in an initial long-distance telephone call in which by his own testimony he

gave plaintiff the briefest of descriptions of the claim. Plaintiff, on the other hand, claimed in his response and on cross-examination of "Tom Kelly" that he had merely said that if you would like to forward the file to me for my review I'll take at look at it and get back to you.

For the information of this Court, a responsive filing by "Tom Kelly" in the first filing of Plaintiff's claim against Mr. Kelly, CA 87-489, "Tom Kelly" contradicted his testimony before the Bar Association, which is a matter of transcript record, by asserting in CA 87-489, that he described the claim in considerable and great detail.

Although plaintiff declined to factually assert that there was a connection between the Complaint of "Tom Kelly" and a long drawn out civil case, J. D. Barter Construction Co. & Mattingly Bridge Company vs. Eugene Goss, Commissioner of Highways, et al in which Plaintiff was counsel for the Kentucky Association of Highway Contractors and its Executive Director, Vic Comley, and certain grand jury proceedings which had been commenced and were then pending in Louisville, Kentucky, in which the U. S. Department of Justice, Division of Anti-Trust, was presenting evidence as to alleged highway bid rigging in Kentucky, plaintiff did make it plain that there were some things plainly wrong in his view with the phone call, the claim, and "Tom Kelly's" testimony.

Plaintiff was ruled out of order in his efforts to present the background and context in which "Tom Kelly's" claim arose. Subpoened witnesses were excused and others' motions to quash were granted. Nevertheless, plaintiff did (1)maintain both to the Bar Association and to the Kentucky Supreme Court that at least <u>two</u> witnesses who did testify had committed perjury--that the plaintiff did so is a matter of record and (2)endeavored in vain to get the Bar Association administrative staff to initiate an investigation into why the aforementioned civil suit had been permitted to go on for a total of <u>eleven years.</u> It went on to facilitate an on-going criminal investigation when it, the civil suit, in which plaintiff was counsel, was itself without merit. It was without merit because for one thing, at least, plaintiffs' cause of action was an action in tort for alleged tortious interference with the creation of a legitimate business expectancy arising from the submission by Barter of low bids on three fedeally funded highway projects in eastern Kentucky. However, quite early in its history, it became clear that Barter claimed one relationship between the co-plaintiffs in action and Mattingly claimed another, and that both could'nt be telling the truth and that furthermore they couldn't ever prevail because they had themselves submitted an illegal bid. Yet the Circuit Court <u>and the Kentucky Supreme Court</u> let it go on and on nonetheless until its final dismissal nearly eleven years after it had first been filed and just 60 days after the federal grand jury was convened in Louisville in 1981.

In 1987, "Tom Kelly" admitted in his handwritten filing in CA 87-489 that his real name was Richard J. Sirbello. That was one of four respects in which he committed perjury before the Kentucky Bar Association; three of them do not depend upon mere contradiction by plaintiff. That is also true of the other witness who committed perjury in that proceeding.

Richard J. Sirbello used the mails to send the Kentucky Bar Association his Complaint signed and notarized as "Tom Kelly" and in which one of the other respects in which he committed false swearing and perjury appears.

Richard J. Sirbello crossed state lines in coming from Ohio to Kentucky to testify to the Kentucky Bar Association in the name of "Tom Kelly" and there to perjure himself, that is, testify under oath falsely, in three other material respects.

The defendant, Frank Wrenick, an attorney, notarized "Tom Kelly's" signature, did so knowing that it would be transmitted by mail in interstate commerce, and violated the law of the state of Ohio in so notarizing the signature by "Tom Kelly".

Do you find these facts in Magistrate Judge Cook's statement of the facts? You do not, and that should be

sufficient cause not to approve his findings of fact and recommendation.

When this matter was in part originally filed in 1987 in CA 87-489, it was then dismissed without prejudice by Judge Wilhoit who in his order recited that it appeared to be essentially a collateral attack on the proceedings before the Bar Association and in the Kentucky Supreme Copurt. I do not fault Judge Wilhoit for so ruling at that time, because plaintiff was having difficulty proceding without funds to do what needed to be done and because Judsge Wilhoit had the wisdom to dismiss that action without prejudice. That was before it was revealed that Frank Wrenick, the indiv-idual who notarized the "Tom Kelly" signature, was himself a lawyer. However, to dismiss this action now would be a serious miscarriage of justice. And to do so before discovery is complete could only be labeled a "cover up".

While it may be true that the prosecution of this civil action may greatly embarrass both the Kentucky Bar Association's administrative staff, the members of one of its tribunals, and the Kentucky Supreme Court, that is not sufficient reason to deny plaintiff his right of action against someone who fraudulently notarizes a document that results in injury to hi9m and/or against someone who knowingly falsely misrepresents himself and the subrogation claim in the referral telephone call that preceded this complaint to the bar association.

Mr. Wrenick was not a witness, and he is not entitled to witness immunity.

B. The Plaintiff's Claim:

There is complete diversity of citizenship, and the Complaint clearly states the requisite elements of a cause of action for fraud and misrepresentation. Although proof will conclusively prove that two persons committed perjury in testimony to the Kentucky Bar Association at the hearing on "Tom Kelly's" claim, plaintiff's cause of action is for fraud and misrepresentation in the phone call and referral of the claim (and provable facts will bear him out) and against Frank Wrenick for fraudulently making it possible for a person like Richard Sirbello to pose as someone he wasn't.

The cause of action is not one to invalidate the Kentucky Bar Association petition to the Kentucky Supreme Court or the Order of the Kentucky Supreme Court temporarily suspending plaintiff from practice. It is an action for damages against the defendants Sirbello, Wrenick, and the Leutenbergs; it is not an action to invalidate plaintiff's temporary suspension from practice, though he considers that an injustice and ill-considered. The Plaintiff is guaranteed the right of action he has brought by both the Constitutions of Kentucky and the United States but also by the federal diversity of citizenship statute.

C. Law:

For the information of Magistrate Judge Cook, plaintiff has researched both Kentucky and Ohio law on the subject of laches and statutes of limitations, and neither have merit herein. Since the Magistrate Judge is not relying on same, I shall let this suffice unless further quotation and citation of the authorities should become necessary.

Neither of the cases cited by Magistrate Judge Cook in support of his statement that plaintiff's claim is essentially a collateral attack on the decision of the Kentucky Supreme Court say what he cites them to day, and it is not factually correct for reasons of fact above stated to say that plaintiff's claim is essentially a collateral attack on the decision of the Kentucky Supreme Court in its order temporarifly suspending plaintiff from the practice of law.

Ginger v. Wayne County Circuit Court, 372 F. 2d 621 (6th Cir.), cert.denied 387 U.S. 935 (1967) doesn't support the Magistrate Judge's assertion in such regard. It dealt with an action by an attorney directly against a Circuit Court, its judges and members of grievance committee of a state bar for compensatory damages. That is not what this action is and is clearly distinguishable on various grounds.

Likewise, Fair v. Givan, 509 F. Supp. 1086 (N.D. Ind. 1981) says no such thing and does not

consider whether something is or is not a collateral attack. It was an action by a state prison inmate seeking injunctive and declaratory relief against the state attorney general and Chief Justice of the Indiana Supreme Court to prevent them from preventing another inmate from assisting him in various legal matters in state court.

III. CONCLUSION:

I presume that Magistrate Judge Cook and the Court know what a "sting scam" is. It comes in misleading people into thinking the object is one thing or person when it is actually quite another. But what if it doesn't work or goes awry? What then?

I would also remind the Magistrate Judge and the Court of two important considerations.

The courts exist to dispense justice, civilly and criminally; they do not exist to protect the government against its own wrongs, its own violations of the law, nor bar associations against embarrassment resulting from the ineptness with which its administrative staff investigated and considered some matter injurious to others, nor Judges against violations of their oaths of office or the canons of Judicial Ethics.

The government is not free to violate the law and constitutionally protected rights, privileges and immunities in the pursuit of its objectives.

The long drawn-out civil suit referred to by plaintiff resulted in injury to two people, neither of whom were in any way implicated in the matter under criminal investigation. One of them, James Watson, former chief administrative aide in the office of governor, committed suicide the day before his deposition was to be taken for the second time--five years into the civil suit--when the case ought to have already been dismissed. The other, plaintiff, herein, sustained financial injury as well as a reputation for not being able to get a case dismissed which ought to have been dismissed.

Having been proven right thus far, if the Court accepts the recommendation of Magistrate Judge Cook, it will do so to its eventual embarrassment., If it follows him, failing to compel discovery and terminate this action and plaintiff's cause of action against the defendants named, then such action would amount essentially to a "cover up" and will be so labeled by plaintiff in all subsequent proceedings. A copy of plaintiff's Complaint in CA 93-299 is submitted herewith as Exhibit 1 to plaintiff's exceptions herein.

/s/ Clifford E. Smith, Jr.
Clifford E. Smith, Jr., Plaintiff
Pro Se
361 Linden Walk #3
Lexington KY 40508-3019
AC 606 253-0802

Certificate of Service

I hereby certify that a copy of the foregoing exceptions has been duly served upon the other parties to this action by mailing a copy of same, postage prepaid, to their respective counsel of record for Frank Wrenick and the Leutenbergs and to Richard Sirbello individually at their respective addresses of record herein this 31st day of August 1993.

/s/Clifford E. Smith, Jr.,
Clifford E. Smith, Jr, Plaintiff
Pro Se

(Note: Exhibit 1 referred to hereinabove is rather voluminous. A copy of it has been previously mailed to all defendants served with process or their counsel, and a copy of same is on file in the office of the Clerk, U. S. Supreme Court . See Petition in case of Clifford E. Smith, Jr. v. William Barrett et al.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 92-382

CLIFFORD E. SMITH, JR. PLAINTIFF

V. ORDER

TOM KELLY, et al, DEFENDANTS

This matter is before the Court on a motion by defendants to dismiss and for sanctions. These motions were referred to Magistrate Judge James F. Cook for initial consideration. The Magistrate Judge has prepared proposed findings of fact and recommends that defendants' motion to dismiss be sustained, that the motion for sanctions be overruled, and that this matter be dismissed with prejudice and stricken from the docket. Plaintiff has filed timely objections.

The Court has reviewed the record and is in agreement with the conclusions reached by the Magistrate Judge. The arguments raised by plaintiff in his objections do not call into questions(sic) these conclusions. In fact, the arguments made in the objections constitute another of what the Magistrate Judge has termed "collateral attack(s) on the decision of the Kentucky Supreme Court regarding its decision to

suspend the plaintiff's license {to practice law}." It is precisely this sort of attack over which the Court has no subject matter jurisdiction.

Accordingly,

IT IS THEREFORE ORDERED AND ADJUDGED:

(1) That the Magistrate Judge's Proposed Findings of Fact and Recommendation is hereby approved and adopted as and for the opinion of the Court;

(2)That in conformity with the recommendation, defendants' motion to dismiss is SUSTAINED, and defendants' motion for sanctions is OVERRULED;

(3)That all other pending motions are OVERRULED AS MOOT;

(4)That this action is DISMISSED WITH PREJUDICE and shall be STRICKEN from the docket.

This 7th day of September, 1993.

/s/ Henry R. Wilhoit, Jr.

Henry R. Wilhoit, Jr., Judge

No. 93-6476

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLIFFORD E.. SMITH, JR.
Plaintiff-Appellant,

v.

ORDER

TOM KELLY, also known as Richard J. Sirbello, doing business as Jemklan & Associates, Inc; MITCHELL A. LEUTENBERG; JAY LEUTENBERG; ESTELLE LEUTENBERG; FRANK E. WRENICK,
Defendants-Appellees

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

BEFORE: MARTIN and SUHRHEINRICK, Circuit Judges, and JORDAN, District Judge.

Clifford E. Smith, Jr., a pro se Kentucky litigant appeals a district court order dismissing his civil complaint filed pursuant to 28 USC Section 1332.

Additionally, he has filed a motion requesting defendant Wrenick to give a deposition. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 1982, defendant Kelly, who is a citizen of Ohio, contacted Smith, who at the time was an attorney licensed to practice law in the Commonwealth of Kentucky, regarding Smith accepting and handling a legal matter for Kelly in Kentucky. The events that transpired thereafter are disputed between the parties. Suffice it to say that Kelly caused a complaint to be filed against Smith with the Kentucky Bar Association, which resulted in the Kentucky Supreme Court suspending Smith's license to practice law in 1984. The order of suspension has not, as of this date, been lifted.

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* The Honorable Leon Jordan, U. S. District Judge for the Eastern District of Tennessee, sitting by designation.

Smith filed two separate complaints in the District Court for the Eastern District of Kentucky, claiming that Kelly's statements and actions in retaining Smith services, or at the least, attempting to retain his services in 1982, were fraudulent, that Kelly's complaiunt to the Kentucky Bar Association was unfounded, and that the statements made in support of the complaint were false. Smith alleged that the three Leutenberg defendants were employees of Jemklan and Associates, Inc., along with Kelly. Smith alleged that defendant Wrenick falsely notarized Kelly's name to the complaint filed with the Kentucky Bar Association when Kelly's actual name was Sirbello. Both complaints were consolidated by order of the district court.

The defendants filed motions to dismiss, advancing different arguments in support, including res judicata, laches and statute of limitations, and lack of subject matter jurisdiction. The matter was referred to a magistrate judge who issued a report recommending that the motions to dismiss be granted. Despite Smith's objections, the district court adopted the report and recommendation in an order filed September 7, 1993. Reconsideration was denied in an order filed October 27, 1993.

On appeal, Smith argues: (1)that the district court erred when it dismissed the complaint on the basis that it constituted an impermisssible collateral attack on Smith's 1984 disbarment; (2)that the district court erred when it refused to

grant Smith's request for discovery; and (3)that the district court did not comply with the standards of the Sixth Circuit when it dismissed the complaint.

The standard of review on the issue of subject matter jurisdiction is de novo. *Greater Detroit Resource Recovery Auth. v. EPA,* 916 F. 2d 317, 319 (6th Cir. 1990). "{E}very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Bender v.. Williamsport Area Sch. Dist.,* 475 U.S. 534, 541 (1986) (quoting *Mitchell v. Maurer,* 293 U. S. 237, 244 (1934).

Upon review, we conclude that the district court properlfy dismissed the complaint for lack of subject matter jurisdiction. Smith's complaint is essentially a collateral attack on the decision of the Kentucky Supreme Court regarding its decision to suspend Smith's license to practice law and its underlfying factual findings regarding the circumstances of the relationship between Smith and the defendants in 1982. State supreme court decisions concerning disbarment are not subject to collateral attack in the district court. *District of Columbia Court of Appeals v. Feldman,* 460 U. S. 462, 482 (1983); *Ginger v. Circuit Court for Wayne County,* 372 F. 2d 621, 625 (6th Cir.) (per curiam), *cert.denied,* 387 U.S. 935 (1967). Smith cannot invoke the jurisdiction of the federal courts merely by couching his claim for relief as a diversity action based on

fraud when he is actually seeking relief for the suspension of his license to practice law.

Upon further review, we conclude that the district court did not abuse its discretion when it denied Smith's motion for discovery as moot. *Lavado v. Keohane,* 992 F. 2d 601, 604 (6th Cir. 1993); *Chrysler Corp. v. Fedders Corp.*, 643 F. 2d 1229, 1240 (6th Cir.), *cert.denied*, 4354 U.S. 893 (1981). Because Smith's complaint constituted an impermissible collateral attack on Smith's 1984 disbarment, any discovery could not have changed the nature of the collateral attack on the disbarment.

Finally, we find no merit to Smith's claim that the district court failed to comply with the standards of the Sixth Circuit when it dismissed the complaint for lack of subject matter jurisdiction. The district court acted in accordance with prior holdings of this circuit.

Accordingly, the motion requesting defendant Wrenick to give a deposition is denied, and the district court's order is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,m
Clerk

Case No. 93-6476

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

CLIFFORD E. SMITH, JR.
Plaintiff-Appellant

v.

TOM KELLY, also known as Richard J. Sirbello, doing business as Jemklan and Associates, Inc.; MITCHELFL A. LEUTENBERG; JAY LEUTENBERG; ESTELLE LEUTENBERG; FRANK E. WRENICK

Defendants- Appellees

BEFORE: MARTIN and SUHHEINRICH, Circuit Judges and JORDAN*, District Judge

It appearing that the court received a Petition for Rehearing from the appellant on August 22, 1994,

It is ORDERED that the untimely Petition for Rehearing not be accepted for filing.

ENTERED BY ORDER OF THE COURT

s/s Leonard Greenm
Leonard Green, Clerk

* The Honorable Leon Jordan, U. S. District Judge for the Eastern Distarict of Tennessee, sitting by designation.

Supreme Court of Kentucky

84-SC-641-KB

KENTUCKY BAR ASSOCIATION COMPLAINANT

V. IN SUPREME COURT

CLIFFORD E. SMITH, JR. RESPONDENT

ORDER OF TEMPORARY SUSPENSION

****

The petition of the Inquiry Tribunal for an order of temporary suspension, having been considered under SCR 3.165, and the Court finding there is reasonable cause to believe that respondent is mentally disabled and that he does not have the mental fitness to continue to practice law, respondent is hereby temporarily suspended from the practice of law in the Commonwealth of Kentucky.

IT IS FURTHER ORDERED THAT:

1. Within twenty (20) days from the date of entry of this order of suspension, respondent shall notify all clients in writing of his inability

to continue to represent them and shall furnish photostatic copies of said letters of notice to the Director of the Kentucky Bar Association.

2. The temporary suspension of respondent shall be effective with the entry of this order and shall continue in effect until such time as the merits of this disciplinary proceeding can be finally determined by this Court in accordance with SCRf 3.370 or SCRf 3.480 or until such time as respondent can show good cause why the order of temporary suspension should be amended or dissolved, including but not limited to respondent's compliance with this court's order of October 19, 1984.

3. Such portion of this proceeding as contained in this order shall be deemed a matter of public record at this time. All other portions of the record shall be afforded the confidentiality required under SCR 3.150 unless otherwise directed by the Court.

All concur.

ENTERED November 9th, 1984.

/s/Robert F. Stephens
Chief Justice

cc: Bruce K. Davis, Director
Michael M. Hooper, Assistant Director
Kentucky Bar Association
West Main at Kentucky River
Frankfort, Kentucky 40601

Clifford E. Smith, Jr.
212 Washington Street
Frankfort, Kentucky 40601

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 92-382

CLIFFORD E. SMITH, JR. PLAINTIFF

VS.

TOM KELLY (alias RICHARD J. SIRBELLO), INDIVIDUALLY AND D/B/A JEMKLAN & ASSOCIATES, INC.
(Serve: Richard J. Sirbello
16303 Arcade Ave.
Cleveland, Ohio 44110)

JEMKLAN & ASSOCIATES, INC.
P. O. Box 18007
3473 Fairmount Boulevard
Cleveland, Ohio 44118

MITCHELL A. LEUTENBERG
2474 Fenwick Rd.
University Heights, Ohio 44115

JAY LEUTENBERG
2474 Fenwick Road
University Heights, Ohio 44115

ESTELLE LEUTENBERG
2474 Fenwick Rd.
University Heights, Ohio 44115

FRANK E. WRENICK
2645 Ashton Road
Cleveland Heights, Ohio 44118 DEFENDANTS

* * * * * * * * *

1. Plaintiff is a citizen and resident of Lexington, Fayette County, Kentucky.

2. Defendants Tom Kelly (alias Richard J. Sirbello), Mitchell A. Leutenberg, Jay Leutenberg, Estelle Leutenberg, and Frank E. Wrenick are residents of the State of Ohio. Defendant Jemklan & Associates, Inc. is the name of a corporation that was incorporated under the laws of the State of Ohio.

3. The matter in controversy exceeds in amount that necessary, if any, to involve the diversity of citizenship jurisdiction of this Court, that is, exceeds $50,000 in amount.

4. This Court has jurisdiction of the action under USCA 28 Section 1332.

5. On or about September 22, 1982, the defendant Tom Kelly (alias Richard J. Sirbello) in Cleveland, Ohio, using the name "Tom Kelly", telephoned plaintiff at plaintiff's law office in Frankfort, Kentucky, and told plaintiff that he, "Mr. Kelly", would like to refer to plaintiff for representation a subrogation claim of the Motorist Mutual Insurance Company on "the usual contingent fee basis." Plaintiff had never before had any contact with or done any business with either/any of defendants.

6. Defendant "Tom Kelly" (alias Richard J. Sirbello), acting for himself as well as for Defendants Jemklan & Associates, Inc. and Mitchell A. Leutenberg, Jay Leutenberg, and Estelle Leutenberg, by words both express and implied, indicated that he was an adjuster in an insurance adjuster's office acting on behalf of Motorist Mutual Insurance Company in making the contact with plaintiff.

7. In fact, the defendant "Tom Kelly" (alias Richard J. Sirbello) was acting in his own behalf as well as that of defendants heretofore named, to wit, Mitchell A. Leutenberg, Jay Leutenberg, Estelle Leutenberg, and Jemklan & Associates, Inc.

which was not an insurance adjusting firm at all but instead a collection agency, facts he at no time mentioned or disclosed during said telephone conversation.

8. The claim which prompted and was the subject of the defendant's telephone call to plaintiff had in fact been rejected by the subrogation department of Motorist Mutual Insurance Company as worthless or not worth pursuing and had been procured by the defendants for the collection agency with other claims similarly rejected by Motorist Mutual's own subrogation department, no mention or disclosure of which was made by "Mr. Kelly" in his telephone call to plaintiff.

9. "Mr. Kelly" did not describe the claim in any detail and did not mention or disclose that if the investigating police officer's accident report was correct the intended defendant of the claim had a complete defense.

10. The person placing the call to plaintiff expressly represented to plaintiff in said telephone call that his name was "Tom Kelly" and further continued to use that name in all subsequent acts by himself vis-a-vis the plaintiff.

11. The defendant "Tom Kelly", who now claims to be Richard J. Sirbello, individually as well as doing business as and on behalf of

defendant Jemklan & Associates, Inc., by his overt acts, statements, and omissions falsely, fraudulently and deceitfully misrepresented himself, the nature of his business, and the character and actual referrer of the claim in the aforesaid telephone call in the particular and specific respects factually set forth in paragraphs 5, 6, 7, 8, 9, and 10 hereof.

12. Relying upon the statements/representations made by the defendant "Tom Kelly", who now claims to be Richard J. Sirbello, but reserving decision as to whether he would undertake legal representation of Motorist Mutual Insurance Company on the claim until he had reviewed the file, plaintiff told the defendant "Mr. Kelly" he could send plaintiff the file for plaintiff's inspection and that plaintiff would review it and get back to him.

13. Thereupon, the defendant "Mr. Kelly", who now claims to be Richard J. Sirbello, mailed the claim file to plaintiff, signing the referral letter "Tom Kelly", a name not in fact his real name. The letter of transmittal is dated 9/23/82.

14. Upon receipt, plaintiff discovered from inspection of the file (a) that the claim was almost two years old when referred to plaintiff; (b)that if the investigating police officer's reportd, which nothing in the file disputed, was correct, the intended defendant had a complete defense and the claim was

worthless or without merit; (c)that the referral letter signed "Tom Kelly" did not refer the claim simply for collection but expressly directed the plaintiff to file suit and to take a whole series of other actions which, considering the small sum at issue, would have been counterproductive for plaintiff, something the referrers had to have known and were in fact aware of when the initial telephone call was made to plaintiffa; and (d)pursuant to other investigation by plaintiff, that the claim was not that of an adjuster acting on behalf of Motorist Mutual but instead that of a fly-by-night collection agency, Jemklan & Associates, Inc., and that the person posing as "Tom Kelly" now claims to be instead a Richard J. Sirbello.

15. The defendant, "Tom Kelly", who now claims to be Richard J. Sirbello, acting for himself, defendant Jemklan & Associatges, Inc., and defendant Mitchell A. Leutenberg, Jay Leutenberg, and Estelle Leutenberg, thereafter made repeated long distance telephone calls to plaintiff's office in Frankfort, Kentucky in regard to the fraudulently misrepresented claim, the last of which was made by him on December 28, 1982, threatening to complain to the Kentucky Bar Association if plaintiff did not file suit to try to collect the fraudulently misrepresented and apparently on-its-face unmeritorious claim.

16. Pursuant to his reliance upon the initial telephone conversation with "Mr. Kelly" and consequent assent to receive the claim file for review, the plaintiff was threatened with complaint to the Kentucky Bar Association if he did not file suit to collectd the claim that was fraudulently misrepresented to plaintiff from the outset; was in fact subsequently subjected to complaint and proceedings in such regard; and has been irreparably damaged both financially and in reputation and has suffered mental and emotional anguish and embarassment and has incurred substantial financial damages of which the fraud, misrepresentation and deceit of the defendants, individually, as well as collectiveldy, is a direct and proximate cause or, as otherwise stated, was a substantial factor in causing and bringing about.

COUNT II

1. That in furtherance of the fraud and misrepresentation set forth in Count I, paragraphs 5-16, the defendant "Tom Kelly" executed a formal complaint to the Kentucky Bar Association regarding plaintiff in which he misrepresented both his own actions and those of plaintiff and which complaint he signed "Tom Kelly".

2. Further, in conjunction with said Complaint to the Kentucky Bar Association the defendant "Tom Kelly" did appear at a

hearing held by the KBA, and being duly sworn, gave his name as "Tom Kelly" and also testified that he had left other advantageous employment to start Jemklan & Associates as "my own company", both of which statements were false and then known to the person testifying to be false.

3. That the defendants Mitchell A. Leutenberg, Jay Leutenberg, and Estelle Leutenberg were either the sole or principal and majority shareholders in the defendant Jemklan & Associates, Inc.

4. That the defendants Mitchell A. Leutenberg, Jay Leutenberg, and Estelle Leutenberg knew that the person referring the subrogation claim to plaintiff was not "Tom Kelly" but in fact another person posing as "Tom Kelly".

5. That the actions of the defendant "Tom Kelly" were performed under the direction and supervision of Mitchell A. Leutenberg, Jay Leutenberg, and Estelle Leutenberg and with their knowledge. More particularly, the defendants Mirtchell A. Leutenberg, Jay Leutenberg, and Estelle Leutenberg knew that the call made to plaintiff was not on behalf of Motorist Mutual Insurance Company, was not being made in the capacity of an adjuster or adjusting firm but rather fon behalf of a collection agency owned by them, and further knew that the person who signed the complaint to the Kentucky Bar Association

against plaintiff was not in fact an individual by the name of Tom Kelly and further that the individual who was to appear before the Kentucky Bar Association and testify as "Tom Kelly" was not in fact an individual by such name.

6. That the defendant Frank E. Wrenick is an attorney licensed to practice law in the state of Ohio.

7. That the defendant Frank E. Wrenick as an attorney was commissioned a notary public in the state of Ohio on 26 July 1972, which appointment was, as is the practice for attorneys being commissioned notaries in Ohio, for an indefinite period.

8. That the defendant Frank E. Wrenick fraudulently, falsely, and deceitfully notarized the signature of "Tom Kelly" on the complaint that was filed with the Kentucky Bar Association.

9. That at the time of so notarizing that signature, the defendant Frank E. Wrenick knew or by reasonable diligence as required by law should have known that the person whose signature he was notarizing was not in fact an individual by the name of Tom Kelly.

10. That the action by the defendant Frank E. Wrenick in falsely, fraudulently and

deceitfully notarizing the signature of "Tom Kelly" on the complaint to the Kentucky Bar Association violated the law applicable to notaries public of the State of\ Ohio.

11. That the action by the defendant Frank E. Wrenick in falsely, fraudulently and deceitfully notarizing the signature of "Tom Kelly" on the complaint to the Kentucky Bar Association was unethical behavior by an attorney licensed to practice law in the State of Ohio.

12. That the action by the defendant Frank E. Wrenick in falsely, fraudulently and deceitfully notarizing the signature of "Tom Kelly" on the complaint to the Kentucky Bar Association helped to perpetrate and further the fraud previously and subsequently committed by "Tom Kelly".

13. That by reason of the fraudulent actions of the defendants, and each of them as set forth in Count II of this Complaint, the plaintiff was subjected to a disciplinary hearing at which the fraud heretofore mentioned was further perpetrated and advanced.

14. That pursuant to the actions of the defendants, and each of them hereinabove described, the plaintiff was not only

threatened with complaint to the Kentucky Bar Association if he did not file suit to collect the claim that was fraudulently misrepresented to plaintiff from the outset; was in fact subsequently subjected to complaint and proceedings in such regard; and has been irreparably damaged both financially and in reputation and has suffered mental and emotional anguish and embarassment and has incurred substantial financial damages of which the fraudulent, misrepresentations and deceit of the defendants "Tom Kelly" (alias Richard J. Sirbello), Mitchell A. Leutenberg, Jay Leutenberg, Estelle Leutenberg, and Frank E. Wrenick individually, as well as collectively, is a direct and proximate cause or, as otherwise stated, is a substantial factor in causing and bringing about and but for which such damages would not have occurred.

16. That in addition to compensatory damages, the plaintiff seeks from the defendants, jointly and severally, punitive damages.

WHEREFORE, plaintiff asks judgment against the defendantds and each of them, jointly and severally, in an amount shown by the evidence and proof, trial by jury, a reasonable attorney's fee, recovery of his costs, and such other relief as the Court deems just and equitable.

/s/ Clifford E. Smith, Jr., Pro Se

361 Linden Walk #3
Lexington KY 40508-3019

DOCKET SHEET 92-382

Date	Nr.	Proceedings
1982	JUDGE WILHOIT	
9-22	1	COMPLAINT
9-23		6 summons w/1 copy each, issued and given to plaintiff for service.
9-23	2	AMENDMENT of Pltff to Complaint mst
1993		
01/19	3	ANSWER of Deft. Wrenick to Complaint and Amended Complaint mst
01/29	4	ORDER (HRW) ent. 02/01/93: that pltff Clifford E. Smith, Jr. show cause within 10 days of the date of this Order why this case should not be dismissed for failure to prosecute as to the defts Tom Kelly,Individually and d/b/a Jemklan & Associates Inc., Jemklan & Assoc., Mitchell A. Leutenberg, Jay Leutenberg and Estelle Leutenberg. COM/ms

02/08	5	RESPONSE of Pltff to Show Cause Order mst
02/17	6	SUMMONS issued on Frank E. Wrenick whosing(sic) service by cert mail on 12/28/92 of the complaint
02/17	7	SUMMONS issued on Estelle Leutenberg showing service by cert mail on Estelle Leutenberg on 1/20/93 of the complaint
02/17	8	SUMMONS issued on Mitchell A. Leutenberg showing service by cert mail on Estelle Leutenberg on 120/93 of the complaint
02/17	9	SUMMONS issued on Jemklan & Associates, Inc. RETURNED UNEXECUTED as undeliverable as addressed; no forwarding address on file
02/17	10	SUMMONS issued on Tom Kelly a/k/a Richard J. Sirbello RETURNED UNEXECUTED showing returned unclaimed

02/17	11	SUMMONS issued on Jay Leutenberg showing service on Estelle Leutenberg by cert mail on 1/20/92 mst
03/31	12	ORDER (HRW) ent. 04/01/93: that the action is referred to the Hon. James Cook for appropriate disposition. COM/mst
04/20	13	MOTION of Pltff Smith for consolidation of Civil Actions 92-382 and Lex. Civ. 93-34
05/27	14	MOTION of Pltff to(sic)Order Compelling Discovery mst
6/02	15	MOTIFON of deft., Frank E. Wrenick, to Dismiss and Motion for Sanctions
6/02	16	MEMORANDUM of deft., Frank E. Wrenick, in Support of Motion to Dismiss
08/16	17	ORDER (JFC) ent. 08/18/93: that actions are before court on motions of pltff to consolidate

		actions as they are duplications. It is ORDERED that the pltffs motions to consolidate are SUSTAINED, that Lex.Civ 93-34 is CONSOLIDATED with LexCiv 92-382 and that future activity in this consolidated action shall be styled in Lex.Civ. 92-382.
08/16	18	PROPOSED FINDINGS OF FACT AND RECOMMENDATION (JFC) ent. 08/18/93; that it is RECOMMENDED that the defts motions to dismiss to this action be SUSTAINED, that ch defts motion for sanctions be OVERRULED and that this action be DISMISSED WITH PREJUDICE and STRICKEN from the active docket of this court. COM/mst
08/30	19	OBJECTIONS of Pltff to PFOF&R mst
09/07	20	ORDER (HRW) ent. 09/08/93: that (1)Mag. Judge' PFOF&R is hereby approved and adopted

		as and for the opinion of the court; (2)that in conformity with the recommendation, defts motion to dismiss is SUSTAINED and defts motion for sanctions is OVERRULED; (3)that all other pending motions are OVERRULED AS MOOT; (4) that this action is DISMISSED WITH PREJUDICE and shall be STRICKEN from from the docket. COM/mst NOE/mst
09/17	21*	MOTION of pltff to Amend or Alter, for Specific Findings of Fact and Conclusions of Law and for Judicial Disclosures REP #23
10/25	22	AMENDED CERTIFICATE of Service of Pltff of Motion to amend
10/27	23	ORDER (HRW) ent.: that matterf is before the court on the

		motion of pltff to alter and amend. It is ORDERED that the pltff's motion to alter or amend is OVERRULED. COM/.mst
11/08	24	NOTICE of Clifford Smith to appeal to 6CCA COM./mst

DOCKET SHEET FOR 93-34

Date	Nr.	Proceedings
1993		JUDGE KARL S. FORESTER
1/25/93	1	COMPLAINT (6 with 1 copy each summons(es) issued; Fee Paid $120.00, Receipt No. 048129 (mst) {Entry date 01/26/93}
3/19/93	2	RETURN OF SERVICE executed upon defendant Frank E. Wrenick on 3/8/93 by personal service at 2628 Queenshow(sic) Road, Cleveland Heights, Ohio 44118; address on front of summons was incorrect, served w/complaint and summons (mst)
3/19/93	3	RETURN OF SERVICE executed upon defendant Tom Kelly, a/k/a Richard J. Sirbello, on 3/8/93 by personal service by leaving copy of complaint and summons with Richard

		Sirbello (mst)
3/19/93	4	RETURN OF SERVICE unexecuted - attempted as to defendant Mitchell A. Leutenberg; mother of Mitchell A. Leutenberg notified server that Mitchell A. Leutenberg is deceased. (mst)
3/19/93	5	RETURN OF SERVICE executed upon defendant Jay Leutenberg on 3/4/93 by personal service upon his wife w/complaint and summons (mst)
3/19/93	6	RETURN OF SERVICE executed upon defendant Estelle Leutenberg on 3/4/93 by serving deft. personally at Leutenberg Graphics Corporation (mst)
3/29/93	7	ANSWER by defendant Frank E. Wrenick to {1-1} (mst)
4/20/93	--	ADDITIONAL SUMMONS issued as to defendant Jay Leutenberg and given to attorney for service (mst)

4/26/93	9	ORDER by Judge Karl S. Forester. Case referred to Mag. Judge James F. Cook (cc: all counsel) (mst)
5/6/93	10	MOTION by defendant Jay Leutenberg, defendant Estelle Leutenberg to dismiss action with prejudice as to each deft, for sanctions against pltff and ordering pltff to pay defts attorney fees, for preliminary injunction to keep pltff from filing any additional actions and from additional actions against moving defts, to strike references to Mitchell Leutenberg (mst)
5/6/93	11	MEMORANDUM by defendant Jay Leutenberg, defendant Estelle Leutenberg in support of motion to dismiss action with prejudice as to each deft {10-1}, of motion for sanctions against pltff and ordering pltff to pay defts attorney fees {10-2}, of motion for

		preliminary injunction to keep pltff from filing any additional actions and from additional actions against moving defts {10-3}, of motion to strike references to Mitchell Leutenberg {10-4} (mst)
5/14/93	12	RESPONSE by plaintiff Clifford E. Smith Jr. to motion to dismiss action with prejudice as to each deft. {10-1}, to motion for sanctions against pltff and ordering pltff to pay defts attorney fees {10-2}, to motion for preliminary injunction to keep pltff from filing any additional actions and from additional actions against moving defts {10-3}, to motion to strike references to Mitchell Leutenberg {10-4}\ (mst) {Entry date 05/17/93}
5/25/93	13	AMENDED CERTIFICATE of Service by plaintiff Clifford E. Smith, Jr. for response to motion filed on behalf of Mr. & Mrs. Leutenberg

showing service of same on
5/25/93 (mst)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COA Docket No. CA 93-6476
(USDC ED KY CA #92-382)

CLIFFORD E. SMITH, JR. PLTF-APPELLANT

VS. MOTION

TOM KELLY(alias RICHARD J. SIRBELLO), INDIVIDUALLY AND D/B/A JEMKLAN & ASSOCIATES, INC.; JEMKLAN & ASSOCIATES, INC; MITCHELL A. LEUTENBERG; JAY LEUTENBERG; ESTELLE LEUTENBERG; FRANK E. WRENICK
DEFENDANTS-APPELLEES

* * * * * * * * * * *

Comes the Plaintiff-Appellant, Clifford E. Smith, Jr., Pro-Se, and moves the U. S. Court of Appeals for the Sixth Circuit for an Order directing the Defendant-Appellee Frank E. Wrenick to make a matter of record herein, under oath or penalty of perjury, the Department of government by which he was employed at any time during the period 1970-1983.

In the alternative, for an Order directing the

Defendant Frank E. Wrenick to give his deposition under oath, upon oral examination by Plaintiff-Appellant in the presence of a Judge of the U. S. Court of Appeals, either of the panel assigned to the appeal or other Judge designated by it or by the Chief Judge in a location in the federal courthouse bldg. at 100 East Fifth Street, Cincinnati, Ohio, more particularly described in the Order on a day and date and at a time also designated in the Order. Plaintiff-Appellant will provide his own Court Reporter to record and transcribe said deposition, although the Court may also designate one of its own court reporters to do so if it wishes.

You see, there is a right way to conduct an investigation.

Respectfully submitted,

CLIFFORD E. SMITH, JR.
PLAINTIFF-APPELLANT, PRO SE
361 Linden Walk #3
Lexington, Kentucky 40508-3019
AC 606 253-0802

CERTIFICATE OF SERVICE

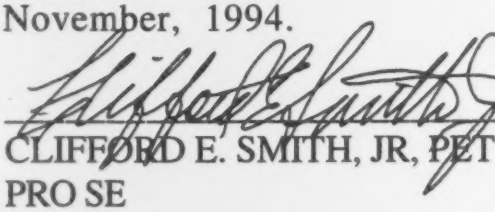
I hereby certify that a copy of the foregoing Motion has been served upon the defendants-appellees served with process hereinbelow by mailing a true copy of same, postage prepaid, to: Tom Kelly (alias Richard J. Sirbello), 16303

Arcade Avenue, Cleveland, Ohio 44110; Joseph D. Zamore, Zamore, Kasdan & Gisser, The Superior Building, Suite 1920, 815 Superior Avenue, N.E. Cleveland, Ohio 44114-2701, attorney for defendants-appellees Jay Leutenberg and Estelle Leutenberg; and Guy E. Tweed, II, Esq., 1392 SOM Center Road, Mayfield Heights, Ohio 44124, attorney for Defendant-Appellee Frank E. Wrenick, this 5th day of July 1994.

s/s Clifford E. Smith, Jr.
Clifford E. Smith, Jr., Pro Se

NOTARIZED CERTIFICATE OF SERVICE

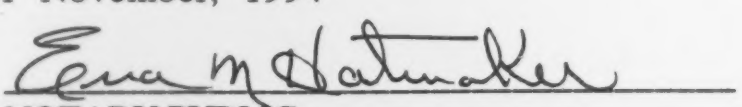
I hereby certify that a copy of the within Petition for Writ of Certiorari has been duly served upon the other defendants hereinbelow served with process by mailing a copy of same, first class mail, postage prepaid, to the following: Tom Kelly (alias Richard J. Sirbello), 16303 Arcade Avenue, Cleveland, Ohio 44110; Joseph D. Zamore, Amore, Kasdan & Gisser, The Superior Building, Suite 1920, 815 Superior Avenue, N.E., Cleveland, Ohio 44114-2701, attorney for defendants-appellees Jay Leutenberg and Estelle Leutenberg; and Guy E. Tweed II, Attorney for defendant-appellee Frank E. Wrenick, 1392 SOM Center Road, Mayfield Heights, Ohio 44124 this 1st day of November, 1994.



CLIFFORD E. SMITH, JR, PETITIONER
PRO SE
361 Linden Walk #3
Lexington KY 40508-3019
AC 606 253-3019

COUNTY OF FAYETTE)
)SS:
STATE OF KENTUCKY)

Subscribed and sworn to before me, a Notary Public, by Clifford E. Smith, Jr., this 1st day of November, 1994



NOTARY PUBLIC
My Commission expires 3-4 1995